

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA**

BENJAMIN FRANKLIN SCOTT,

Petitioner,

v.

**Civil Action No. 1:06cv163
Criminal Action No. 1:02cr27
(Judge Keeley)**

UNITED STATES OF AMERICA,

Respondent.

OPINION/REPORT AND RECOMMENDATION

On November 8, 2006, the *pro se* petitioner, Benjamin Franklin Scott, filed a Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct a Sentence by a Person in Federal Custody and a Motion to Proceed as a Pauper. On November 15, 2006, the undersigned conducted a preliminary review of the file and found that summary dismissal was not warranted. Accordingly, the Respondent was directed to show cause why the writ should not be granted.

On December 4, 2006, the Respondent filed a response to Petitioner § 2255 motion. In the response, the Respondent asserts that it has conferred with Chief Public Defender Brian Kornbrath, whose conduct is challenged in the petition, and believes that only an evidentiary hearing can resolve the factual issues raised in the petition. Therefore, the Respondent moves for a date and time for the taking of evidence regarding the allegations in the petition and to allow the United States further opportunity to respond to the factual issues as they are developed from the hearing.

On December 22, 2006, the Petitioner filed a reply to the Respondent's response. In his reply, Petitioner asserts that the Respondent has not filed a proper response to his § 2255 motion as set forth in Rule 5 of the Rules governing Section 2255 Proceedings in the District Courts.

Petitioner also reiterates the Respondents request for the Court to set a date and time for an evidentiary hearing concerning the facts in the petition. This matter is before the undersigned for a report and recommendation pursuant to LR PL P 83.15 and Standing Order No. 4.

Upon a review of the pleadings in this case, the undersigned recommends that the parties requests for an evidentiary hearing be GRANTED, that the Petitioner's request to proceed as a pauper (dckt. 2) be GRANTED and that counsel therefore be APPOINTED to represent Petitioner at the evidentiary hearing.

Within ten (10) days after being served with a copy of this Opinion/Recommendation, any party may file with the Clerk of the Court written objections identifying those portions of the Recommendation to which objections are made, and the basis for such objections. A copy of such objections shall also be submitted to the Honorable Irene M. Keeley, United States District Judge. Failure to timely file objections to the Recommendation set forth above will result in waiver of the right to appeal from a judgment of this Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); Thomas v. Arn, 474 U.S. 140 (1985); Wright v. Collins, 766 F.2d 841 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984), cert. denied, 467 U.S. 1208 (1984).

The Clerk is directed to send a copy of this Report and Recommendation to the *pro se* petitioner and counsel of record.

DATED: December 28, 2006.

/s John S. Kaull

JOHN S. KAULL

UNITED STATES MAGISTRATE JUDGE